IJM Construction Sdn Bhd v Lingkaran Luar Butterworth (Penang) Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCvC)(W)-1607–08 OF 2022
NANTHA BALAN, MOHD NAZLAN AND CHOO KAH SING JJCA
18 MARCH 2024

Civil Procedure — Judgment and orders — Consent judgment — High Court gave judgment for respondents that consent judgment was null and void and set aside by reason of misrepresentation by appellant — Appeal against decision — Whether appellant made any representation — Whether appellant made any false or fraudulent misrepresentation — Whether there was inducement

This was an appeal from the decision of the High Court in granting a declaration in favour of the respondents that the consent judgment they had entered into with the appellant arising from an earlier civil suit was null and void and set aside by reason of misrepresentation by the appellant. The appellant was part of a group which principal business was in heavy and civil engineering construction. The first respondent held the concession to build and maintain the Butterworth Outer Ring Road coastal expressway. The second respondent was an investment holding company involved in the privatisation of government projects. For the purpose of the construction of the expressway, the first respondent had awarded certain sections of the construction works to the appellant, which the appellant completed. The appellant had also assisted in financing the first respondent in the completion of the construction of the expressway. This was provided by the appellant subscribing to an aggregate total of 29,000,000 redeemable preference shares ('RPS') issued by the first respondent in the sum of RM29m. In accordance with the terms of the governing subscription agreements, the first respondent was to redeem the RPS upon the issuance of the certificate of practical completion for the expressway. Further, should the first respondent fail to adhere to the terms of the subscription agreements, the appellant was entitled to put the said RPS for sale to the second respondent and the second respondent must purchase the same pursuant to two option agreements. Despite the completion of the expressway project, and notwithstanding the appellant issuing the relevant redemption and the requisite option notices, the respondents did not comply with their obligations under the subscription agreements and the option agreements, respectively. Almost two years later, the first respondent informed the appellant that it wished to settle the outstanding contracts amicably and commercially. The appellant agreed but after a couple of years, there was still no settlement. As further attempts at settling the matter continued to fail, the appellant commenced proceedings against the

A respondents in the High Court for the recovery of sums due under the respective subscription agreements and option agreements ('Suit 290'). Before the trial, meetings were held between the parties. A document entitled 'salient terms' was signed between PW2 from the respondents and DW1 from the appellant, for the appellant to purchase shares in Rayston Consortium B (Butterworth) Sdn Bhd ('RCBSB') from Eco Intelek Sdn Bhd to make possible the appellant's participation in a land reclamation proposal. Significantly, the redemption sums for the RPS would be set off from the purchase consideration of the shares in RCBSB. As a result, the appellant and the respondents recorded a consent judgment in Suit 290 ('the consent judgment'). Nonetheless, despite C all the meetings, in the end, there was no settlement during the two-year moratorium agreed to in the consent judgment. The appellant later issued a statutory demand pursuant to s 218 of the Companies Act 1965 against the first respondent. The appellant proceeded to present a winding up petition against the first respondent on the basis of the consent judgment. This led the D respondents to commence proceedings seeking mainly for a declaration that the consent judgment was null and void; that the consent judgment was to be set aside; and that the appellant be ordered to pay damages to the respondent and the sum of damages to be assessed by the court. The High Court gave judgment for the respondents and hence, this appeal. The issues for E determination were: (a) whether the appellant made any representation; (b) whether the appellant made any false or fraudulent misrepresentation; and (c) whether there was inducement.

Held, allowing the appeal:

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(1) The appellant denied having made any statements of facts which amounted to misrepresentations and maintained that they were true statements and in the nature of future intention and not misrepresentation of statements of fact. There were merits in this G submission. There were sufficient qualifications in the salient terms which operated on the premise on not only there being further discussions to take place, but also which required action by both the respondents, and not merely the appellant. The respondents did not even show that the promise made by the appellant was a representation of fact H relating to an existing state or situation. Such a promise could not sustain a claim in misrepresentation (see paras 43, 46–47 & 56).

(2) The salient terms was the precursor to the consent judgment, contained promises which were significantly qualified. DW1's evidence that the governing process at the appellant companies that only more concrete I and finalised proposals required scrutiny by the board of directors was reasonable and in accord with commercial and business practice and reality. The absence of a board resolution authorising DW1 to sign the salient terms was also a non-issue and certainly ought not to warrant the conclusion that he and by extension the appellant never intended to

pursue the matter. Neither the respondents nor any of their representatives had ever asked that DW1 produce the appellant's board resolution to allow DW1 to enter into the initial discussions or to sign the salient terms. It could not be seen how the statements of promises in the salient terms could be construed to have been false or fraudulently made, what more to the detriment of the respondents. Therefore, misrepresentation — false, not to mention fraudulent — on the part of the appellant, was not made out by the respondents (see paras 64–65, 68, 71–72 & 88).

(3) It was difficult to agree with the High Court's finding that the respondents were induced on the basis that they could have proceeded to defend the Suit 290 against them. This was because it was the respondents who undeniably owed the appellant, such that the two-year moratorium had so obviously been advantageous to the respondents in terms of delaying any risk of potential judgment be entered against them, especially if at the same time the further discussions were also designed to achieve a commercial settlement between the parties. The appellant should not be faulted if the respondents offered a way for parties to settle the matter amicably and not to expend further costs and time on a trial. Given that the consent judgment, if settlement had been achieved, would have benefitted all parties, especially so the respondents, the finding of the High Court that the appellant had induced them to enter into the same could not therefore be sustained. Moreover, there was absolutely nothing to show that the respondents had ever at the material time complained that the appellant had exerted any undue influence or pressure. The evidence did not support the finding of the High Court that the appellant had induced the respondents to enter into the consent judgment (see paras 96, 101–103 & 118).

[Bahasa Malaysia summary

Ini adalah rayuan daripada keputusan Mahkamah Tinggi dalam memberikan pengisytiharan yang memihak kepada responden bahawa penghakiman persetujuan yang mereka telah buat dengan perayu yang timbul daripada saman sivil sebelum ini adalah terbatal dan tidak sah dan diketepikan oleh sebab salah nyata oleh perayu. Perayu adalah sebahagian daripada kumpulan yang perniagaan utamanya adalah dalam pembinaan kejuruteraan berat dan awam. Responden pertama memegang konsesi untuk membina dan menyelenggara Lebuhraya Lingkaran Luar Butterworth lebuh raya pesisir pantai. Responden kedua adalah syarikat pemegangan pelaburan yang terlibat dalam penswastaan projek kerajaan. Bagi tujuan pembinaan lebuh raya, responden pertama telah menganugerahkan bahagian tertentu kerja pembinaan kepada perayu, yang telah disiapkan oleh perayu. Perayu juga telah membantu dalam membiayai responden pertama dalam menyiapkan pembinaan lebuh raya tersebut. Ini disediakan oleh perayu yang membeli

jumlah agregat 29,000,000 saham keutamaan boleh tebus ('RPS') yang diterbitkan oleh responden pertama dengan jumlah RM29 juta. Selaras dengan terma perjanjian langganan yang memerintah, responden pertama adalah untuk menebus RPS apabila sijil perakuan siap kerja untuk lebuh raya itu dikeluarkan. Selanjutnya, sekiranya responden pertama gagal mematuhi syarat perjanjian langganan, perayu berhak untuk meletakkan RPS tersebut untuk dijual kepada responden kedua dan responden kedua mesti membeli yang sama menurut dua perjanjian pilihan. Walaupun projek lebuh raya telah siap, dan walaupun perayu mengeluarkan penebusan yang berkaitan dan notis pilihan yang diperlukan, responden masing-masing tidak mematuhi kewajipan mereka di bawah perjanjian langganan dan perjanjian pilihan. Hampir dua tahun kemudian, responden pertama memaklumkan perayu bahawa ia ingin menyelesaikan kontrak tertunggak secara baik dan komersial. Perayu bersetuju tetapi selepas beberapa tahun, masih tiada penyelesaian. Memandangkan percubaan selanjutnya untuk menyelesaikan perkara itu terus gagal, perayu memulakan prosiding terhadap responden di Mahkamah Tinggi untuk mendapatkan semula jumlah tertunggak di bawah perjanjian langganan dan perjanjian pilihan masing-masing ('Saman 290'). Sebelum perbicaraan, mesyuarat diadakan antara pihak. Satu dokumen bertajuk 'terma penting' telah ditandatangani antara PW2 daripada responden dan DW1 daripada perayu, untuk perayu membeli saham dalam Rayston Consortium (Butterworth) Sdn Bhd ('RCBSB') daripada Eco Intelek Sdn Bhd bagi membolehkan perayu mengambil bahagian dalam cadangan tebus guna tanah. Dengan itu, jumlah penebusan untuk RPS akan ditolak daripada pertimbangan pembelian saham dalam RCBSB. Akibatnya, perayu dan responden merekodkan penghakiman persetujuan dalam Saman 290 ('penghakiman persetujuan'). Namun begitu, di sebalik semua mesyuarat, pada akhirnya, tiada penyelesaian sepanjang moratorium dua tahun yang dipersetujui dalam penghakiman persetujuan. Perayu kemudiannya mengeluarkan tuntutan statutori menurut s 218 Akta Syarikat 1965 terhadap responden pertama. Perayu terus mengemukakan petisyen penggulungan terhadap responden pertama berdasarkan penghakiman persetujuan. Ini menyebabkan responden memulakan prosiding terutamanya untuk mendapatkan pengisytiharan bahawa penghakiman persetujuan adalah terbatal dan tidak sah; bahawa penghakiman persetujuan akan diketepikan; dan bahawa perayu diperintahkan membayar ganti rugi kepada responden dan jumlah ganti rugi yang akan dinilai oleh mahkamah. Mahkamah Tinggi memberikan penghakiman kepada responden dan oleh itu, rayuan ini. Isu-su untuk penentuan adalah: (a) sama ada perayu membuat sebarang representasi; (b) sama ada perayu membuat sebarang salah nyata palsu atau penipuan; dan (c) sama ada terdapat dorongan.

Diputuskan, membenarkan rayuan:

(1) Perayu menafikan telah membuat apa-apa pernyataan fakta yang

berjumlah salah nyata dan mengekalkan bahawa ia adalah kenyataan yang benar dan dalam sifat niat masa depan dan bukan salah nyata pernyataan fakta. Terdapat merit dalam hujahan ini. Terdapat kelayakan yang mencukupi dalam terma penting yang beroperasi di premis tersebut bukan sahaja terdapat perbincangan lanjut yang perlu dilakukan, tetapi juga yang memerlukan tindakan oleh kedua-dua responden, dan bukan hanya perayu. Responden tidak menunjukkan bahawa janji yang dibuat oleh perayu adalah representasi fakta yang berkaitan dengan keadaan atau situasi sedia ada. Janji sedemikian tidak dapat mengekalkan tuntutan sebagai salah nyata (lihat perenggan 43, 46–47 & 56).

(2) Terma penting adalah pendahulu kepada penghakiman persetujuan, mengandungi janji-janji yang layak. Keterangan DW1 bahawa proses tadbir urus di syarikat perayu bahawa hanya cadangan yang lebih konkrit dan muktamad memerlukan penelitian oleh lembaga pengarah adalah munasabah dan selaras dengan amalan dan realiti komersial dan perniagaan. Ketiadaan resolusi lembaga yang memberi kuasa kepada DW1 untuk menandatangani terma penting itu juga bukan isu dan tidak wajar untuk membuat kesimpulan bahawa beliau dan dengan lanjutan perayu tidak pernah berhasrat untuk meneruskan perkara itu. Juga tiada responden mahupun mana-mana wakil mereka tidak pernah meminta DW1 mengemukakan resolusi lembaga perayu untuk membenarkan DW1 memasuki perbincangan awal atau menandatangani terma penting. Tidak dapat dilihat bagaimana penyataan janji dalam terma penting boleh ditafsirkan sebagai palsu atau dibuat secara penipuan, apa lagi yang merugikan responden. Oleh itu, salah nyata — palsu, apatah lagi penipuan — di pihak perayu, tidak dibuktikan oleh responden (lihat perenggan 64–65, 68, 71–72 & 88).

(3) Sukar untuk bersetuju dengan penemuan Mahkamah Tinggi bahawa responden telah didorong atas dasar bahawa mereka boleh meneruskan untuk mempertahankan Saman 290 terhadap mereka. Ini kerana responden yang tidak dapat dinafikan berhutang dengan perayu, sehingga moratorium dua tahun itu jelas memberi kelebihan kepada responden dari segi penangguhan sebarang risiko penghakiman yang berpotensi dikenakan terhadap mereka, terutamanya jika pada masa yang sama perbincangan lebih lanjut juga direka untuk mencapai penyelesaian komersial antara pihak. Perayu tidak seharusnya dipersalahkan sekiranya responden menawarkan cara kepada pihak-pihak untuk menyelesaikan perkara itu secara baik dan tidak membelanjakan kos dan masa tambahan untuk perbicaraan. Memandangkan penghakiman persetujuan, jika penyelesaian telah dicapai, akan memberi manfaat kepada semua pihak, terutamanya responden, maka keputusan Mahkamah Tinggi bahawa perayu telah mendorong mereka untuk membuat perkara yang sama tidak dapat dikekalkan. Lebih-lebih lagi, tiada langsung yang menunjukkan bahawa responden pernah pada masa yang material

mengadu bahawa perayu telah melakukan apa-apa pengaruh atau tekanan yang tidak wajar. Keterangan tidak menyokong dapatan Mahkamah Tinggi bahawa perayu telah mendorong responden untuk memasuki penghakiman persetujuan (lihat perenggan 96, 101–103 & 118).]

Cases referred to

Abdul Razak bin Sheikh Mahmood & Ors v Amanah Raya Bhd & Ors and another appeal [2018] 5 MLJ 125, CA (refd)
Antaios Cia Naviera SA v Salen Rederierna AB [1985] AC 191, HL (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)
Beattie v Lord Ebury (1872) LR 7 Ch App 777, CA (folld)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Chia Tien Foh & Ors v Lo Man Heng & Ors [2015] MLJU 2238; [2015] 1 LNS 1219, CA (refd)
Clydesdale Bank Ltd v Paton [1896] AC 381, HL (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Lai Fee & Anor v Wong Yu Vee & Ors [2023] 3 MLJ 503, FC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Mars Equity Sdn Bhd v Tis 'Ata'ashar Sdn Bhd [2006] 4 MLJ 302, CA (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)
Nor Azlina bt Abdul Aziz v Expert Project Management Sdn Bhd [2017] 3 MLJ 763; [2017] 5 CLJ 58, CA (refd)
Shinning Crest Sdn Bhd (appointed receiver and manager) & Ors v Malaysia Building Society Bhd [2018] 10 MLJ 491, HC (refd)
Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim [2003] 3 MLJ 460, CA (refd)
Wales v Wadham [1977] 2 All ER 125 (refd)
Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors [2015] 6 MLJ 810, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 35(4), 132(1), (1E), 218
Contracts Act 1950 s 18

Appeal from: *Lingkaran Luar Butterworth (Penang) Sdn Bhd & Anor v IJM Construction Sdn Bhd* [2022] MLJU 3743 (High Court, Shah Alam)

Ng Sai Yeang (with Angeline Leow Suk-Huei) (Raja, Darryl & Loh) for the appellant.
Cecil Abraham (with Sunil Abraham, Alex Tan Chie Sian and Ho Zhi Yee) (Wong Kian Kheong) for the respondent.

Mohd Nazlan JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal arises from the decision of the High Court which granted a declaration in favour of the plaintiffs (the respondents before us) that the consent judgment they had entered into with the defendant (the appellant herein) arising from an earlier civil suit was null and void and be set aside by reason of misrepresentation by the latter.

[2] Having heard the appeal — which was conducted via *Zoom* video technology, examined the appeal records and considered the submissions by parties, we unanimously decided to allow the appeal and set aside the judgment of the High Court.

[3] These grounds of judgment contain the full reasons for our decision.

KEY BACKGROUND FACTS

[4] The appellant is part of a group which principal business is in heavy and civil engineering construction. The first respondent holds the concession (awarded by the Government on 28 April 1997) to build and maintain the Butterworth Outer Ring Road coastal expressway. The second respondent is an investment holding company involved in the privatisation of government projects.

[5] For the purpose of the construction of the expressway, the first respondent had awarded certain sections of the construction works to the appellant, which the latter completed.

[6] The appellant had also assisted financing the first respondent in the completion of the construction of the expressway. This was provided by the former subscribing to an aggregate total of 29,000,000 redeemable preference shares ('the RPS') issued by the latter in the sum of RM29m.

[7] In accordance with the terms of the governing subscription agreements dated 14 May 2002 and 8 September 2003, the first respondent was to redeem the RPS upon the issuance of the certificate of practical completion for the expressway. Further, should the first respondent fail to adhere to the terms of

A the subscription agreements, the appellant was entitled to put the said RPS for sale to the second respondent and the second respondent must purchase the same pursuant to two option agreements also dated 14 May 2002 and 8 September 2003.

B **[8]** Despite the completion of the expressway project, and notwithstanding the appellant issuing the relevant redemption and the requisite option notices beginning in 2007, the respondents did not comply with their obligations under the subscription agreements and the option agreements respectively. By way of separate letters both dated 25 April 2008, the first and second respondents' former solicitors wrote to the appellant's solicitors seeking the latter's indulgence to grant the first respondent an extension of time to resolve its issues with the Government and its financiers. A status update on the respondents' negotiations with the Government was communicated to the appellant in a letter dated 27 June 2008 from the respondents' former solicitors to the appellant's solicitors.

[9] Almost two years later, by way of a letter dated 4 February 2010, the first respondent informed the appellant that the first respondent wished to settle the outstanding contracts amicably and commercially and had appointed Dato' Ir Cheah Lai Shin ('Dato Sonny Cheah') (who held no position in the respondents, and later became PW2) to act on its behalf to discuss and negotiate with the appellant. The appellant responded a day later in its letter of 5 February 2010, informing that the appellant's Dato' Goh Chye Koon ('Dato' Goh'), then a director at the appellant, would liaise with Dato Sonny Cheah to prepare a time frame and proposal to reach an amicable commercial settlement.

[10] That was 2010. Still, after a couple of years, there was no settlement. Then in 2013, by way of separate letters dated 19 February 2013, the appellant's solicitors wrote to the respondents stating that the ongoing negotiations over the last few years did not conclude into an amicable resolution and as such, the appellant now demanded the second respondent to make payments pursuant to the options agreements, and reserved its rights of action against the first respondent for damages.

[11] As further attempts at settling the matter continued to fail, and as the appellant's position then was that the statute of limitation was about to set in, the appellant on 25 March 2013 moved to commence proceedings against the respondents in the High Court of Malaya at Shah Alam via Suit No 22NCvC-290–03 of 2013 ('Suit 290'), for the recovery of sums due under the respective subscription agreements and option agreements. The appellant's summary judgment application was however dismissed by the High Court on 17 July 2013 which found an issue to be tried concerning whether there was

forbearance by the appellant as the plaintiff to institute Suit 290 against the respondents. The trial for Suit 290 was fixed for 21 October 2013.

[12] Before the trial could begin, the respondents separately wrote to the appellant on 2 September 2013 for the parties to come together to resolve the matter, and Dato' Sonny Cheah too approached one Liew Hau Seng who was a director of the respondent — IJM (and then the managing director of its holding company, IJM Corp Bhd) (DW1) where the former again indicated the intention to discuss an amicable resolution of Suit 290. By way of a letter dated 5 September 2013, the appellant's solicitors wrote to the respondents' former solicitors stating that while the appellant was amenable to commence discussions for a resolution of the matter, the appellant's solicitors were instructed to proceed with the filing of the trial documents, and to proceed with trial in the event the negotiations were not concluded into a settlement agreement by the trial date. The appellant too wrote to the two respondents separately on 9 September 2013 confirming that it was amenable to negotiate and to resolve the matter with the respondents directly without involvement from parties' lawyers and the appellant also expressed its hope that the parties could reach an amicable settlement by 21 October 2013 and to proceed with the recording of a consent judgment.

[13] Meetings were consequently held between the parties on 19 September 2013 and 2 October 2013, and in a letter of 2 October 2013, the appellant's solicitors informed the respondents' solicitors that the respondents had agreed to enter into consent judgment, and the appellant would provide the written terms upon which the appellant would be agreeable to withhold execution, provided that the consent judgment should be recorded no later than 14 October 2013.

[14] Following another meeting on 11 October 2013, which was attended by Liew (DW1) and Dato' Goh for the appellant, and Dato Sonny Cheah (PW2) and Jonathan Cheah Pe-Howe (PW1) for the respondents, PW2 and DW1 signed a document entitled 'Salient Terms', for the appellant to purchase shares in Rayston Consortium (Butterworth) Sdn Bhd from Eco Intelek Sdn Bhd ('Eco Intelek'), as suggested by Dato Sonny Cheah, to make possible the appellant's participation in a land reclamation proposal. Significantly, the redemption sums for the RPS would be set off from the purchase consideration of the shares in RCBSB. The appellant's solicitors in a letter of even date informed the respondents' former solicitors that the respondents had agreed to the terms of judgment in the draft as enclosed to be recorded on 14 October 2013. Thereafter, by way of a further letter dated, this time 16 October 2013, the appellant's solicitors wrote to the respondents' former solicitors notifying them that one David Ong from the respondents' office had agreed to record the

terms of judgment on 17 October 2013 in accordance with the draft that was sent to the respondents' former solicitors earlier.

[15] On 17 October 2013, the appellant and the respondents recorded a consent judgment in Suit 290 ('the consent judgment'). The terms of the consent judgment are reproduced below:

> ... BY CONSENT IT IS HEREBY ADJUDGED AS FOLLOWS:
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> 1. that with effect from 18th October 2015, the 1st and 2nd Defendants do specifically effect and do all that is necessary to redeem the 13,500,000 Redeemable Non-Convertible Preference Shares ('RPS') and 15,500,000 RPS from the Plaintiff, as prayed in the Statement of Claim, within 14 days of the date of the notice being given by the Plaintiff to the Defendants and to be performed specifically by the 1st and 2nd Defendants as follows:
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>   a) In respect of the 1st Defendant, to make redemption of the 13,500,000 RPS and 15,500,000 RPS (the 'said RPS') from the Plaintiff by making payment in the sums of RM13,500,000.00 and RM15,500,000.00 to the Plaintiff whereupon the Plaintiff shall deliver the duly executed share transfer forms together with the share certificates for the said RPS; and
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>   b) In respect of the 2nd Defendant, to pay the purchase price for the RPS, in the sum of RM13,500,000.00 and RM15,500,000.00 to the Plaintiff whereupon the Plaintiff shall deliver the duly executed share transfer forms in favour of the 2nd Defendant together with the share certificates for the said RPS;
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> 2. that the 1st and 2nd Defendants are to pay interest on the said sums of RM13,500,000.00 and RM15,500,000.00 at the rate of 2% above the base lending rate of Malayan Banking Berhad calculated from 3rd January 2008 to the date of full settlement; and
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> 3. that each party will bear their own costs.

[16] Post consent judgment, PW2 and DW1 met twice in 2013 (25 October 2013 and 8 November 2013) and a few times in 2014. And a few more in 2015. Nonetheless, despite all these meetings, in the end, there was no settlement during the two-year moratorium agreed to in the consent judgment.

[17] In the meantime, a winding up petition was presented on 15 December 2014 against the second respondent by Bank Pembangunan Malaysia Bhd.

[18] The appellant's solicitors however started to write again to the respondents' former solicitors in 2015 in order to remind that efforts to resolve the matter did not affect the appellant's right to enforce the consent judgment (letter dated 23 February 2015); to state that the ongoing negotiations had not materialised into any resolution such that the respondents remained bound by

their obligations under the consent judgment (letter dated 23 June 2015); to notify that the respondents were obliged to comply with the consent judgment no later than by 18 October 2015 (letter dated 18 August 2015); and to give them notice to comply with the consent judgment (letter dated 19 October 2015). The appellant's solicitors also wrote directly to the two respondents, reminding them to adhere to the terms of the consent judgment (letter dated 21 October 2015), and to give notice to them to comply with the consent judgment (letter dated 22 October 2015).

[19] By way of a letter dated 21 December 2015, the appellant issued a statutory demand pursuant to s 218 of the Companies Act 1965 against the first respondent. The first respondent's former solicitors, in a letter dated 4 January 2016, sought an extension of two years or until the resolution of the dispute with the Government, whichever was later, on the execution of the consent judgment. On 29 February 2016, the appellant proceeded to present a winding up petition against the first respondent on the basis of the consent judgment.

[20] This led the respondents, on 4 May 2016, to commence proceedings seeking mainly for a declaration that the consent judgment is null and void; that the consent judgment be set aside; and that the appellant be ordered to pay damages to the respondents, and the sum of damages to be assessed by the court.

THE RESPONDENTS' PLEADED CASE

[21] The action against the appellant for the setting aside of the consent judgment is one of misrepresentation. The essence of the respondents' pleaded case, as stated in their written submissions are as follows.

[22] The respondents pleaded that the appellant had represented to them that first, the appellant would purchase shares in Rayston Consortium (Butterworth) Sdn Bhd ('RCBSB'), a reclamation concession company ('the proposed transaction'); secondly, the total redemption sum of RM29m for the RPS including any interest on the said sums would be set off from part of the purchase consideration in the proposed transaction; thirdly, detailed negotiations concerning the proposed transaction would only take place after the respondents agreed to the terms of the consent judgment; and fourthly, the parties were given two years to complete the proposed transaction.

[23] The respondents alleged that acting on the faith as well as the truth of the appellant's aforesaid representations, the respondents gave their consent and agreed to enter into the consent judgment as so induced and influenced.

[24] However, the respondents maintained that after the consent judgment was recorded, the appellant procrastinated on the negotiations in respect of the proposed transaction until the two years finally came to an end and the consent judgment took effect. Thereafter, the appellant demanded the first respondent to comply with the consent judgment, and by this time, the second respondent had already been ordered to be wound up.

[25] The respondents further pleaded that the appellant continued to pressure the first respondent until it culminated with the presentation of a winding up petition.

[26] The respondents' position is that they discovered that the said representations were not true and the appellant had never intended to complete the proposed transaction when the appellant took steps to enforce the consent judgment by way of a winding up petition.

THE VERDICT OF THE HIGH COURT

[27] At the conclusion of the trial which saw the respondents called two witnesses, PW1 and PW2, whilst the appellant called DW1 as its sole witness, the High Court agreed with and gave judgment for the respondents. The learned trial judge found that the appellant had made those representations knowing fully well that they were not true. Those misrepresentations, according to the High Court, led the respondents to be induced and/or influenced to give their consent and agreement to enter into the consent judgment which as a result caused the respondents to suffer loss and damage. The key findings of the High Court will be referred to in the analysis of this court later, below.

MAIN GROUNDS OF APPEAL

[28] The appellant has listed a number of issues in its memorandum of appeal but it suffices for us to state the main grounds of appeal raised by the appellant. The first is that the appellant maintained that primarily it was the respondents who had failed to perform their contractual obligations under the subscription agreements and the option agreements, which in turn arose from the first respondent's failure to make full payment to the appellant for the works done in respect of the Butterworth Outer Ring Road expressway project.

[29] The appellant denied that the appellant or DW1 had made any misrepresentation of facts concerning the salient terms, because the detailed terms of the settlement had not yet been finalised, and that in any event the respondents were represented and advised by solicitors at all material times when the consent judgment was entered into.

[30] The appellant further raised the ground that the respondents or PW2 had not done anything to resolve the issues which required further negotiations after the consent judgment was entered into, and that PW2 was in any event not a credible witness. The appellant further challenged the decision of the High Court on the argument that the respondents did not suffer any loss and damage.

[31] The respondents, on the other hand contended that the High Court had correctly assessed the evidence placed before it and that the primary findings of fact are all supported by the contemporaneous evidence and oral evidence of the witnesses. The High Court did not make any error of law, and there are no appealable errors that warrant appellate intervention.

PRINCIPLES OF APPELLATE INTERVENTION

[32] The law is well-established in that an appellate court will not interfere unless the trial court is shown to be plainly wrong. The Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441, in the judgment written by Azahar Mohamed FCJ (later CJM) reaffirmed the principle to be followed by an appellate court when reversing findings of fact by a trial court:

> [60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (at p 10) per Steve Shim CJ (Sabah & Sarawak). More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd v Genisys Intergrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785 where it was held at p 375 (MLJ); p 800 (CLJ):
>
> > It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41; [1978] 1 LNS 32 *Watt v Thomas* [1947] AC 484 and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309).

[33] The Court of Appeal in *Nor Azlina bt Abdul Aziz v Expert Project Management Sdn Bhd* [2017] 3 MLJ 763; [2017] 5 CLJ 58 in the judgment of the court delivered by Harmindar Singh JCA (now FCJ) held thus:

> [20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are:
>
> (a) where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations (see *Director of Forestry, Sabah & Anor v Mau Kam Tong & Ors and another appeal* [2010] 3 MLJ

509; [2010] 3 CLJ 377);

(b) where there was no proper evaluation of the evidence by the trial judge (see *Lee Nyan Hon & Brothers Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1; [2009] 6 CLJ 626);

(c) where the decision arrived at by the trial court was without judicial appreciation of the evidence (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309);

(d) where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (see *Raja Lob Sharuddin Raja Ahmad Terzali & Ors v Sri Seltra Sdn Bhd* [2008] 2 MLJ 87; [2008] 2 CLJ 284);

(e) where the trial judge was plainly wrong in arriving at his decision (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19);

(f) where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him (see *First Count Sdn Bhd v Wang Yew Logging & Plantation Sdn Bhd* [2013] 4 MLJ 693; [2013] 1 LNS 625 which followed the Privy Council case of *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165; [1984] 1 LNS 40); and

(g) where the judgment is based upon a wrong premise of fact or of law (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] 1 LNS 1416).

[34] In a more recent Federal Court pronouncement on the principles surrounding appellate intervention in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 which cited the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 it was reaffirmed that the position has always been that a decision which is arrived at due to a lack of judicial appreciation of evidence is plainly wrong.

[35] For emphasis, on situations where the decision arrived at by the trial court was without judicial appreciation of the evidence, in the leading case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19, Gopal Sri Ram JCA (as he then was) elucidated on the principles of appellate intervention (subsequently cited and upheld by the Federal Court) in the following terms:

PRINCIPLES OF APPELLATE INTERVENTION

... A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or

rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal.

ANALYSIS AND FINDINGS OF THIS COURT

Setting aside of consent judgment

[36] This suit, which verdict at the High Court found favour with the respondents as the plaintiffs is predicated on an action for the setting aside of the consent judgment entered into between the parties, on the ground of misrepresentation.

[37] It is useful to state that it is already well-settled that a consent judgment can be set aside on the same grounds as those on which an agreement may be set aside. We need only refer to the following self-explanatory passage from the judgment written by Peh Swee Chin FCJ in the leading case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393:

> The grounds referred to for setting aside a consent order or a judgment by consent are grounds which basically relate to consensus ad idem or the free consent of parties to a binding agreement or contract. It is elementary that if it is proved that there are grounds which vitiate such free consent, the agreement is not binding. Now a consent order or a judgment by consent is undoubtedly based on an agreement of both parties where consent to the agreement must or should have been free in the first place. *If the agreement upon which a consent order or judgment by consent is based is vitiated by any ground recognised in equity as vitiating such free consent, such as fraud, mistake, total failure of consideration (see Huddersfield Banking Co Ltd v Henry Lister & Sons* [1895] 2 Ch 273 *and the cases cited therein), then such a perfected consent order or judgment by consent could be set aside in a fresh action filed for the purpose. Grounds which would vitiate such free consent should also include misrepresentation, coercion, and undue influence and other grounds in equity*. (Emphasis added.)

Misrepresentation

[38] As mentioned, the sole ground for the setting aside of the consent judgment, as found by the High Court, is misrepresentation by the appellant, which was held to be fraudulent in nature.

[39] To begin with, it is of relevance to set out s 18 of the Contracts Act 1950

which defines 'misrepresentation' as follows:

> (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> (b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and
>
> (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

[40] Greater elucidation of the application of a cause of action of misrepresentation is found in the decision of this Court in the case of *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460 which relevant part of the judgment written by Gopal Sri Ram JCA (as he then was) reads as follows:

> A misrepresentation may be defined as an unambiguous, false statement of fact which is addressed to the party misled and which materially induces the contract. This definition may be broken down into three distinct elements. *The first is that the representation must be an unambiguous false statement of fact, the second is that it must be addressed to the party misled and the third is that it must be a material inducement to entry into the contract*. (Emphasis added.)

[41] The High Court ruled that the appellant did make the abovesaid representations, which was evidenced to have been reduced into writing in contemporaneous documents which were the minutes of meetings between the appellant and the first respondent between October 2013 to 2015, the minutes recorded by PW1, as well as, primarily, the salient terms that were signed by DW1.

[42] Given the significance of the salient terms to the decision of the High Court, it is apposite that we reproduce the same, hereunder:

> IJM SETTLEMENT/RC(B)SB LAND RECLAMATION
>
> Pursuant to the meeting held between DSC, DCK, and LHS on 11 October 2013, it was agreed that IJM Construction Sdn Bhd ('IJMC'), Lingkaran Luar Butterworth (Penang) Sdn Bhd ('LLB'), Rayston Consortium Sdn Bhd ('RCSB') and Eco Intelek Sdn Bhd ('Eco') (hereinafter collectively 'the Parties') enter into an agreement for the resolution of amounts owing to IJMC pursuant to the following:

No	Description	IJM's Debtor	Approximate Amount (RM)
1.	Contractual claims (construction)	LLB	26,000,000
2.	Certified claims outstanding	LLB	10,000,000

3.	Redeemable Preference Shares 'put option'	LLB/RCSB	29,000,000
4.	Interest component on 'put option' @ 2% above the Malayan Banking base lending rate per annum from 3 January 2008	LLB/RCSB	13,800,000
	TOTAL		78,800.000

The above amounts are indicative only and are subject to further negotiation.

IJMC shall purchase a 15% stake in the reclamation concession company, known as Rayston Consortium (Butterworth) Sdn Bhd ('RC(B)SB') from ECO. The purchase price is derived from the reclamation rights currently entitled to ECO by virtue of ECO's shareholding in RC(B)SB. The computation is as follows:

No	Description	Value	Amount (RM)
1.	Reclamation rights entitlement for 15% stake or RC(B)SB calculated @15% OF 1,005 acres	150 acres or 6,534,000 sq. ft RM21 p.s.f.	N.A.
2.	Purchase price	As above	137,214,000.00
3.	Set off amounts owing to IJMC by LLB and RCSB		(78,800,000.00)
	Total Purchase Price payable by IJM	15% of RC(B)SB	58,414,000.00

The above amounts are indicative only and are subject to further negotiation.

Notwithstanding IJMC is purchasing 15% of RC(B)SB, ECO shall deposit their entire 30% stake in RC(B)SB with the agreed nominated stakeholders to be held on trust for IJMC. IJMC shall be given the option to purchase the balance 15% stake in RC(B)SB at a later date to be determined. The timeframe for IJMC to be taken up. The market value of the reclaimed land at the date of acquisition shall be agreed between the parties upon IJMC giving notice of their intention to execute their right for the option.

The premium payable for IJMC's entry into RC(B)SB shall be entirely set off against the NPV discount on the price payable for the 15% stake. In the event the NPV is determined to be higher than the existing market rate, the difference between the NPV price payable and the above calculated Purchase Price shall be determined to be the premium for entry into RC(B)SB.

IJMC is requesting for discount on the abovementioned market rate for reclaimed land of RM21 p.s.f. and the Parties have agreed to consider the same. IJMC shall also conduct a due diligence on RC(B)SB at the mutual convenience of the Parties.

IJMC has requested that the initial outlay shall not be of any significant amount and the payment of the Purchase Price shall be paid in staggered tranches tied to the reclamation of the land.

IJMC shall arrange for this exercise to be conducted without any announcement.

A The above salient terms have been agreed in principle with detailed negotiations to follow after the finalisation of the consent order between the Parties.

Whether the appellant made any representation

B **[43]** The appellant denied having made any statements of fact which amounted to misrepresentations.

[44] The High Court however held that based on the express terms in the C salient terms, the appellant had, through DW1, made clear representations that the appellant 'shall' purchase shares in RCBSB (as per the second paragraph of the salient terms); that the redemption sum of RM13.5m and RM15.5m (total of RM29m) for the RPS including any interest on the said sums would be set off from part of the purchase consideration in the proposed D transaction (the first and second tables of the salient terms); that the detailed negotiations concerning the proposed transaction would only take place after the appellant agreed to the terms of the consent judgment (eigth paragraph of the salient terms); and the consent judgment would only take effect from 18 October 2015, or two years from 17 October 2013 (when the consent E judgment was recorded).

[45] The respondents argued that the High Court was correct in applying the House of Lords decision in *Clydesdale Bank Ltd v Paton* [1896] AC 381 when concluding as follows:

F [90] Having critically considered the clauses and provisions of the Salient Terms thereto, I am in complete agreement with the contention of the Plaintiff that when the Salient Terms are read as a whole, *the Defendant's Representations are statements of fact even though they were worded in the form of a promise. It would be correct to hold that those are statements of the Defendant's existing intention at the material time*. (Emphasis added.)
G

[46] The appellant however maintained that whilst the above, as attributed to the appellant are true statements, they are in the nature of future intention and not misrepresentations of statements of fact.

H

[47] We find merits in this submission. First, we observe that there are sufficient qualifications in the salient terms which operated on the premise on not only there being further discussions to take place, but also which required action by both the respondents, and not merely the appellant. It cannot be I doubted that the salient terms were referred to as an 'agreement in principle' and that other words to like effect included the statements 'The above amounts are indicative only and are subject to further negotiation', as well as 'The above salient terms have been agreed in principle with detailed negotiations to follow after the finalisation of the consent order ...'.

[48] After all, the leading textbook *Chitty on Contracts* (33rd Ed) clearly explains that an 'agreement in principle' is an incomplete agreement, including when there is a need, like in the present case, for further discussions, in the following terms:

> 2–120 *Agreement in principle only*. Parties may reach agreement on essential matters of principle, but leave important points unsettled so that their agreement is incomplete. *It has, for example been held* that there was no contract where an agreement for a lease failed to specify the date on which the term was to commence; *that an agreement 'in principle' for the redevelopment and disposal of residential property, which specified core terms but left important matters, such as the timing of the project, for future discussion was an 'incomplete agreement and so did not amount to a binding contract* ... (Emphasis added.)

[49] Secondly, we note that the High Court did say the following in respect of the salient terms:

> [89] Those are the terms agreed to by the sefendant and thus they become a representation. 'What is in form a promise may be in another aspect a representation' (see *Clydesdale Bank Ltd v Paton* [1896] AC 381).

[50] However, we are persuaded to agree with the appellant's submission that this conclusion by the High Court had misconstrued *Clydesdale Bank Ltd v Paton* [1896] AC 381 because that authority did not hold that a representation which is worded in the form of a promise of future action (what more in this instant case which required further discussion) is indeed a statement of fact such that it may constitute an action for misrepresentation.

[51] We find support in the following passage from the judgment of Sir Mellish LJ in *Beattie v Lord Ebury* (1872) LR 7 Ch App 777 at 804 which is instructive as is self-explanatory:

> [T]here is a clear difference between a misrepresentation in point of fact, a representation that something exists at that moment which does not exist, and a representation that something will be done in the future. Of course, a representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a representation, if it is anything, it is a contract or promise.

[52] And further, more than a century later, in *Wales v Wadham* [1977] 2 All ER 125 Tudor Evans J held:

> A statement of intention is not a representation of existing fact, unless the person making it does not honestly hold the intention he is expressing, in which case there is a misrepresentation of fact in relation to the state of that person's mind.

[53] It may therefore be stated that a promise made in good faith but not fulfilled contractually does not give rise to any cause of action. Nevertheless, *Clydesdale Bank Ltd v Paton* [1896] AC 381 and *Wales v Wadham* [1977] 2 All ER 125 are authorities for the proposition that if the promise is made *sans* the intention to perform, it is a misrepresentation in respect of the then existing of mind of the promisor, which is a misrepresentation of present fact, giving rise to an action for damages. It is not therefore an accurate proposition in law to say, as suggested by the High Court in the instant case, that a promise of future action is without more a statement of fact such that the non-fulfilment of which may constitute an action for misrepresentation.

[54] Thirdly, and most importantly in this context, it is instructive to appreciate that in respect of the status of statements of future intention, in the case of *Chia Tien Foh & Ors v Lo Man Heng & Ors* [2015] MLJU 2238; [2015] 1 LNS 1219, this court held as follows:

> [35] It is settled law that a claim premised on misrepresentation must be a representation of fact relating to an existing state or situation. It is not a promise to do something in the future. The principles governing an actionable misrepresentation have been spelled out by the Court of Appeal in *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460; [2003] 3 CLJ 227 (CA) at 234 as follows:
>
> ...
>
> [36] In the circumstances of this case, the alleged misrepresentation is not one of fact; instead, it relates to a promise by the first plaintiff to apply the RM19m to pay off the tax liabilities. This misrepresentation, even if proved, is not a statement of fact which is untrue at the time of the representation. Accordingly, such a promise cannot sustain a claim in misrepresentation. We therefore agree with the findings of the learned judge on this issue.

[55] We observe that the case of *Chia Tien Foh* was however not referred to by the High Court in its grounds of judgment in allowing the claim of the respondents.

[56] As such in our judgment, the respondents, as the plaintiffs in this present action did not even, in the first place, show that the promise made by the appellant is a representation of fact relating to an existing state or situation. Such a promise cannot sustain a claim in misrepresentation. It thus fails the first test in *Sim Thong Realty* that the representation must be an unambiguous false statement of fact. For this reason alone, the claim of the respondents to set aside the consent judgment ought to have been dismissed.

Whether the appellant made any false or fraudulent misrepresentation

[57] Now, even if the promises made by the appellant as documented in the salient terms are to be construed as representations which are actionable under the law (which we have found not to be the case), the question then would be whether the representations were false or fraudulent.

[58] The High Court found that the appellant made false representations. This was primarily because of the crucial determination by the High Court that the appellant never had any intention of proceeding further with the proposed transaction after the consent judgment was recorded.

[59] This determination was in turn largely attributed to the testimony of DW1 during his cross examination that no resolution was passed by the appellant's board of directors authorising DW1 to sign the salient terms, that the appellant's board of directors did not know about the salient terms, its holding company too had no knowledge of the salient terms, and that in so far as the appellant was concerned, nothing was agreed upon in the salient terms, which in any case did not have any legal effect nor bind the appellant. In addition, after the salient terms were signed, the appellant did not engage solicitors to carry out any due diligence exercise. Moreover, the appellant did not respond to an e-mail sent by PW1 dated 20 June 2014 to DW1 inquiring, concerning the Butterworth reclamation project, as to when the appellant's finance person would visit the respondents to discuss the proposal as per the salient terms.

[60] In addition, the High Court also found that in spite of the two concerns DW1 had — one was the status of the reclamation issue and the other was the legal actions involving RCBSB - DW1 proceeded nevertheless to sign the salient terms, which according to the High Court contained no qualification, caveat or even a condition with reference to those concerns he admitted he had.

[61] We should highlight that in addition to the test enunciated in *Sim Thong Realty* on the concept of misrepresentation, the Court of Appeal in *Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors* [2015] 6 MLJ 810, in a judgment written by Vernon Ong JCA (as he then was) lists the test in greater granularity in terms of the following five essential matters that must be fulfilled in order to sustain an action in misrepresentation:

> [23] In order to sustain an action for fraudulent misrepresentation, the plaintiffs must establish five essential facts. First, there must be a representation of fact by words or by conduct and mere silence is not enough. Second, the representation must be made with the knowledge that it is false, ie it must be wilfully false or at least made in the absence of any genuine belief that it is true or recklessly (ie without caring whether his representation is true or false (*Derry v Peek* (1889) 14 App Cas 337). Third, the representation must be made with the intention that it should be acted upon by the claimant, or by a class of persons which will include the claimant,

in the manner which resulted in damage to him. Fourth, it must be proved that the claimant acted upon the false statements. Lastly, it must be proved that the claimant has sustained damage by so doing (see *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 at p 211, per Viscount Maugham).

[62] We have dealt with the question whether there was in fact a representation. Now we assess whether there was a *misrepresentation*, assuming there was a representation in the first place. As stated in the above passage in *Yeohata Machineries*, the representation must be made with the knowledge that it is false, in the sense that it must be wilfully false or made recklessly or at least in the absence of any genuine belief that it is true. So, were the alleged representations made by the appellant, knowing they were false?

[63] In holding they were false, reliance was made by the High Court, as mentioned earlier, on the fact that there was no board of directors' resolution of the appellant authorising DW1 to sign the salient terms, and that neither the board nor the holding company of the appellant had knowledge of the salient terms.

[64] We have several issues with this finding. First, the subject-matter here are the salient terms. As shown earlier, this document, which for all intents and purposes was the precursor to the consent judgment, contained promises which are significantly qualified.

[65] Secondly, we find that DW1's evidence that the governing process at the appellant companies that only more concrete and finalised proposals required scrutiny by the board of directors to be reasonable and in accord with commercial and business practice and reality. After all what transaction requires approval of the board in a particular company may differ from another, depending primarily on subject-matter, size, value and if the company or its parent is a stock-exchange listed entity (like the appellant's), the market activity of the listed counter.

[66] For instance, under Chapter 9.02 of the Main Market Listing Requirements on Corporate disclosure policy, a listed issuer (to the extent that a transaction by a subsidiary affects the listed parent) must disclose to the public all material information necessary for informed investing and take reasonable steps to ensure that all who invest in its securities enjoy equal access to such information. And Chapter 10 sets out the requirements that must be complied with including the making of announcements, in respect of transactions entered into by a listed issuer or its subsidiaries.

[67] As such, assuming the transaction is material to begin with, such disclosure is usually only necessary when the terms are finalised in an

agreement, unlike the status of the salient terms. The board of directors of the appellant and the parent company of the appellant not knowing about the signing of the salient terms should not therefore be any issue of concern at all. Nor could it be indicative of the appellant or DW1's intention to make the alleged false representation.

[68] Thirdly, the absence of a board resolution authorising DW1 to sign the salient terms is also a non-issue and certainly ought not to warrant the conclusion that he and by extension the appellant never intended to pursue the matter. DW1 was a director of the appellant company at the material time and he was at the same time the Managing Director of the appellant's parent, IJM Corp Bhd, the listed entity. Clearly, DW1 as a director of the appellant company could be said to be one who had ostensible if not actual authority of the appellant company to conduct himself in regard to the salient terms in the manner that he did. Further it has not been shown that the articles of association of the appellant company prohibited the conduct of DW1 in negotiating and signing the salient terms.

[69] Whilst it is trite that in company law the business and affairs of a company must be managed by, or under the direction of, the board of directors, a single director is usually properly authorised to act on behalf of and bind the company, what more in this case as it was patently known to the respondents that DW1, the director, was also then the Managing Director no less, of the listed parent company. In fact, s 132(1) of the Companies Act 1965 (in force at the material time) states that a director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company. Section 132(1E) further provides that a director, who was appointed as a representative of a shareholder (as DW1 at the appellant company most probably was) shall act in the best interest of the company, and not subordinate his duty to act in the best interest of the company to his duty to his nominator (shareholder).

[70] In any case, had the salient terms properly been an agreement, the execution by DW1 on behalf of the appellant would have been consistent with s 35(4) of the Companies Act 1965 which recognises that contracts on behalf of a company may be made in writing signed by any person acting under its express or implied authority.

[71] Fourthly, neither the respondents nor any of their representatives, particularly Dato Sonny Cheah, had ever asked that DW1 produce the appellant's board resolution to allow DW1 to enter into the initial discussions or to sign the salient terms. It was never an issue. This was probably most unsurprising given the undoubted seniority of the position of DW1 in the appellant, and especially its parent. Such that to suggest that a board resolution

on the authority of DW1 ought to have been produced at this later stage, post-event, is a convenient afterthought on the part of the respondents.

[72] It cannot be emphasised enough that in our judgment, for all intents and purposes, the salient terms are a document which contained promises which are so crystal-clearly qualified by the necessity for further discussions and negotiations. The document is at best an agreement in principle. Parties were still supposed to talk further about opportunities to find a commercial settlement before any possible confirmation and approval. At the same time that it had not even reached a stage that called for a due diligence exercise to be performed but that does not change the fact that as testified by DW1, he was duly authorised to act for the appellant and to execute the salient terms which so plainly was still an agreement in principle subject to further negotiations. We fail to see how these statements of promises in the salient terms could be construed to have been false or fraudulently made, what more to the detriment of the respondents. At the risk of repetition, we state that the appellant had indeed agreed with the respondents to be involved in a settlement by way of land reclamation and a set off of the purchase price of the shares to be purchased, but at that time there were still detailed negotiations to be pursued, as stated in the salient terms.

[73] The High Court's finding that the appellant through DW1 went ahead with the signing of the salient terms despite the appellant's concerns on the two items on the status of the reclamation issue and the legal actions involving RCBSB without qualifying the salient terms with these two specific concerns is also one that we find difficulty reconciling with the totality of the evidence.

[74] These concerns were in the first place captured in the minutes of meetings that followed the signing of the salient terms. These were highlighted to the respondents/Dato Sonny Cheah who must surely have been fully cognizant that these concerns had to be resolved before the proposed land reclamation and the proposed transaction. And if not so resolved during the agreed two-year period, the respondents would have had to abide by the consent judgment.

[75] It was simply unwarranted for the High Court to state that at the time of the signing of the salient terms, DW1 knew that the proposed transaction in the salient terms could never come to completion. It was in the very nature of this commercial venture as envisaged by the parties in the salient terms that whether the same could in fact eventually be realised would be a certainty at that juncture precisely because the parties were supposed to engage in further discussions to address the said two concerns which was for the respondents to resolve but which the latter (and Dato Sonny Cheah) did not state could not be overcome. It is not accurate to suggest that the respondents were not aware of

the two concerns. This is precisely because these concerns pertained to the respondents. And yet they proceeded to sign the salient terms in the belief that the respondents would be able to resolve the concerns, which they eventually could not and, did not. Evidence shows that Dato Sonny Cheah, for the respondents, was well aware of the concerns and yet agreed for the respondents to sign the consent judgment and which surely must have been done in the belief that the respondents would be able to resolve the concerns. DW1 had highlighted these concerns to Dato Sonny Cheah in that they must be resolved before the appellant could proceed with the proposed transaction. It was well understood by all parties involved in the negotiations that the settlement would depend on the success of the land reclamation and the value of the shares to be derived from the reclamation rights and the resolution of the rights to the shares.

[76] Most basically, especially considering the background of the facts concerning the business relationship between the parties, there was absolutely no rational commercial or other reasons for the appellant not to be keen to achieve a successful outcome pursuant to the salient terms. As mentioned, this would obviously mean that the appellant could then secure payment of the sums due to the appellant from the respondents under the subscription and option agreements and at the same time achieve resolution on the sums to be paid under the project. After all, the appellant's interests in the land reclamation project was by purchasing either the rights to reclaim 300 acres of the reclamation area or the 15% of the shares in the reclamation concession company (RCBSB) from Eco Intelek.

[77] It must be stressed that the salient terms did highlight that the transaction would be subject to the success of the reclamation as the value of the shares, then only indicative, was derived from the reclamation rights which them belonged to Eco Intelek and it was then merely indicative. There is no basis to say that the parties were unaware that if the reclamation works subsequently did not take off, parties would consequently not be able to settle on the price of the shares. The parties were similarly aware that the purchase of shares was in turn subject to the outcome of various legal actions involving RCBSB where there was then pending disputes between its shareholders. And also, it had always been highlighted that until resolution of the shareholders' dispute, the appellant's proposed investment of 15% of RCBSB shares — the proposed transaction — would simply not be viable.

[78] It was for the respondents to act to resolve the pending issues to enable the sale of shares to be executed and the reclamation rights to be revived and which must be undertaken within the two years without which the consent judgment would have to be enforced. Instead it cannot be denied that throughout the two years since the signing of the consent judgment, the

respondents (and Dato Sonny Cheah) did not update the appellant on the outcome of the disputes involving RCBSB. The revival of the reclamation rights which had expired also remained at large. As such, we agree that the suggestion of the High Court that DW1 knew that the sale would not come to a completion or that the salient terms 'meant nothing' to DW1 is a mis-appreciation of the evidence.

[79] Ultimately and at its core, the appellant was owed monies, and it wanted recovery. The respondents were responsible to make repayment. The appellant even instituted Suit 290, and had to wait almost six years before it did so. Despite all that, the appellant still agreed to accommodate the requests of the respondents, and thus signed the salient terms and entered into the consent judgment. It would be illogical — commercially and commonsensically — for the appellant to have entered into the consent judgment without believing in the viability of a possible settlement as proposed to them and through the salient terms. The delay by the appellant in the form of agreeing to the two-year time period in the consent judgment is certainly not difficult to fathom since it tried to achieve repayment from the respondents of the RM29m by the setting off from the purchase of the shares mechanism, instead of commencing execution against the respondents, knowing that they continued to contend that they did not have the ability to pay as they were still in negotiations with the Government. Then, the respondents did not have the ability to pay the appellant and there were also sums owed to the consortium of banks who had financed the expressway project. The salient terms presented an avenue of a reasonable opportunity for a possible repayment.

[80] In fact, it could instead be said that it was the respondents and Dato Sonny Cheah who had misrepresented that the commercial settlement in the salient terms was viable despite the concerns when at the end of the day, the concerns and issues were not resolved. As correctly submitted by the appellant too, there is no general obligation to act in good faith during negotiations of commercial contracts. This is not to suggest that there was lack of good faith on the part of the appellant. Instead this is to state the correct threshold to find misrepresentation. The Federal Court in *Lai Fee & Anor v Wong Yu Vee & Ors* [2023] 3 MLJ 503 thus held that:

> The general rule is that mere non-disclosure does not institute misrepresentation, or there is in general no duty on the parties to a contract to disclose material facts to each other, however dishonest such non-disclosure may be in particular circumstances.

[81] We further find that the respondents' raising the issue of the 'finance lady' of the appellant not having attended to meet with PW2 was inconsequential then, as throughout the immediately following next two years, the respondents and Dato Sonny Cheah never in fact produced the requisite

information nor resolved the concerns such that the said non-visit by the appellant's finance team would reasonably not have been sufficiently material to have made any real difference. In any event, there were no complaints about this non-visit until during trial, further suggesting it was a non-issue in the first place.

[82] We note that DW1, for the appellant, had attended all the meetings in furtherance of resolving all the concerns to enable the commercial settlement to take place and with a view towards avoiding the need to enforce the consent judgment after two years (which also resulted in the winding up of the first respondent) and with no recovery at all. Evidence shows that DW1 had met with Jonathan Cheah (PW1) and Dato Sonny Cheah (PW2) on 25 October 2013, 8 November 2013, 6 March 2014, 13 March 2014, 2 April 2014 and on the several other occasions in 2015 to discuss the proposed settlement. In other words, even after the execution of the consent judgment, DW1 continued to meet PW2 on several occasions. Yet the respondents never raised any issues concerning the resolution of the settlement between the parties. For emphasis it must be noted that the consent judgment did expressly mention that it was for the respondents to 'specifically effect and do all that is necessary' to redeem the RPS.

[83] We observe that much reliance was placed by the High Court on the evidence of Dato Sonny Cheah (PW2) in this trial, and on this point, as exemplified in the following passage from the judgment of the court:

> [111] It was argued that PW2 was not a credible witness because he gave unreliable evidence and furthermore he had a vested interest in the sale of the Eco Intelek Sdn Bhd shares. It was contended that his actions and omissions were self-serving. On the part of the court, from my assessment of PW2 in his testimony, I found him to be a genuine and credible witness throughout his testimony and had no reason to disbelieve or doubt his testimony. I accepted his evidence which I found was strongly supported through documentary evidence. He was not evasive but was always ready to explain. Whatever discrepancy that was complained off was not sufficient at all to destroy his credibility. In this regard I found his evidence to be entirely consistent with the plaintiff's pleaded case.

[84] Yet PW2's own testimony, as correctly highlighted by the appellant, unmistakably casts doubt on the respondents' own key assertion against the appellant that the appellant had no intention of performing the alleged representations made. The note of proceedings dated 17 February 2022 recorded the following:

> NSY: Dato', you can disagree with me, if you are of the view that that IJM did not enter into these discussions with you throughout the two years because they didn't want to complete with the consent judgment. You can disagree with me.
>
> SHIN: I agree with you that IJM was keen to conclude.

NSY: Alright. Ok. And to that end, you would agree with me that IJM in fact did go onto all these discussions with you to conclude the agreement and the discussions throughout the years.

SHIN: Yes, I agree, they continued. They want to conclude, yes, in my view, in my (1:33:25 inaudible).

NSY: Yes.

[85] The respondents advanced the argument that the legal dispute involving the shareholders of RCBSB had nothing to do with the proposed transaction on the purchase of shares in RCBSB. We find this untenable. It is clear these are related. From the outset of negotiations, as evidenced, for instance, in the minutes of meeting on 2 October 2013, Dato Sonny Cheah himself suggested for the appellant to acquire shares in RCBSB in order to participate in the land reclamation. He also raised the issue concerning the dispute and RCBSB's proposal to progress forward. Various shareholding structures within RCBSB, which then held the land reclamation concession were shared with the appellant by the respondents, which included highlights on the possible outcome as well as the ideal scenario of the shareholding structures upon the conclusion of the pending legal proceedings which would affect and enable the possible share sale to the appellant.

[86] The objective of the proposed purchase of the shares in RCBSB (the proposed transaction), as part of the larger scheme to achieve commercial settlement between the parties was clearly for the appellant to participate in the land reclamation. It would certainly pose a considerable problem for the appellant if this existing shareholder dispute within RCBSB remained unresolved, more so if the appellant was not even updated on the status of those disputes.

[87] This is pure business common sense. And the law too recognises commercial logic. In the context of the interpretation of commercial contracts, Lord Diplock, for the House of Lords, made this point clearly in *Antaios Cia Naviera SA v Salen Rederierna AB* [1985] AC 191 at p 201 as follows:

> ... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

(See also the decision of this court in *Mars Equity Sdn Bhd v Tis 'Ata'ashar Sdn Bhd* [2006] 4 MLJ 302).

[88] We therefore find that misrepresentation — false, not to mention fraudulent — on the part of the appellant, was not made out by the respondents.

Whether there was inducement

[89] We have dealt with the first two of the elements for the cause of action of misrepresentation. The first is whether there was a clear false statement of fact, which we found not to be the case, because it was a promise and not a statement of fact, and that in any event it was not false. This means the action by the respondents failed, and the suit ought to have been dismissed. The second is that it must be addressed to the party which claimed to be misled, which if it was a misrepresentation, there is no doubt that it had been conveyed to the respondents. We have found there is in any event no misrepresentation by the appellant to begin with. For completeness, the third and final element is that the misrepresentation must be a material inducement to enter into the contract.

[90] The High Court concluded that the appellant's representations had induced the respondents to give their consent and agreement to enter into the consent judgment of 17 October 2013. The reasons set out by the High Court, as correctly identified by the respondents in their written submissions are as follows.

[91] First, it was established through PW2 in his witness statement that the respondents had relied on the said representations. Secondly the respondents could have proceeded to defend the appellant's Suit 290 without the need of having to enter into the consent judgment. Thirdly, the High Court stated that the salient terms are advantageous to the respondents, as follows:

> [106] The only reasonable inference for the court to take is to conclude that the plaintiffs relied on the representations made through the salient terms and the defendant had wanted to induce the plaintiffs to enter into a consent judgment and the only way to go about it was to sign the salient terms. This is because the salient terms are advantageous to the plaintiffs. There is assurance that the defendant 'shall' purchase a 15% stake in the reclamation concession company, RCBSB and the purchase price is to be derived from the reclamation rights currently entitled to Eco Intelek Sdn Bhd by virtue of Eco's shareholding in RCBSB. The plaintiff would certainly be swayed and relieved by this guarantee given by the defendant. It is the proverbial carrot at the end of the stick. Not only that, the redemption sum of RM29m plus interest owing would be set off from part of the purchase consideration. The sweet deal would also be that the consent judgment would only take effect two years later after 18 October 2015. Why would the plaintiff not agree to these sweet terms held out so reassuringly by the defendant.

[92] Fourthly, the High Court arrived at this conclusion that the appellant had intended that the representations would be relied upon by the respondents into agreeing to enter into the consent judgment since the salient terms document itself — specifically the eighth paragraph of the same expressly

provides that detailed negotiations to follow after the finalisation of the consent order between the parties. Fifthly, the consent judgment was recorded six days after the salient terms were signed, which the High Court construed as follows:

> [109] It is all too clear that the plaintiffs had relied on the terms of the salient agreement when giving their consent. Had it not been for those terms put into writing, I do not think the plaintiffs would have willingly agreed to record the consent judgment. It would be no coincidence too that the consent judgment was recorded soon after the salient terms was signed. Thus, given the aforesaid it is not difficult to appreciate that the plaintiffs had relied on the representations given by the defendant and were influenced by those representations to agree to enter into a consent judgment.

[93] The appellant denied having induced the respondents in any manner. The appellant argued that the respondents had agreed to enter into the consent judgment before they even discussed the salient terms, more so as it was Dato Sonny Cheah who had first approached DW1 on a commercial settlement. The appellant's solicitors had always kept the respondents' then solicitors informed of background and developments, and essentially the salient terms and the consent judgment were also designed to benefit the respondents, rendering the finding of the respondents being induced to be erroneous.

[94] Having reviewed the appeal record, we agree with the appellant. The minutes of the meeting on 2 October 2013 recorded that the parties shall enter into a consent order to acknowledge the existence of the sum payable in respect of the RPS and they shall have a two-year moratorium period to achieve that. The consent judgment was thus entered into in the terms where the respondents managed to secure a further two years to pay their existing debt, which could be settled, based on the commercial settlement to be discussed. And this all-important two-year moratorium had been agreed upon since 2 October 2013.

[95] In other words, as correctly submitted by the appellant, the parties were by 2 October 2013 already able to agree on entering into the consent judgment without the subsequent salient terms. This is consistent with the evidence that it was Dato Sonny Cheah who had first approached DW1 to request for further time and who also had their former solicitors advising them, to explore the possibility of achieving a commercial settlement.

[96] At its core, we find it difficult to agree with the High Court's finding that the respondents were induced on the basis that they could have proceeded to defend the Suit 290 filed against them. This is because it was the respondents who undeniably owed the appellant, such that the two-year moratorium had so obviously been advantageous to the respondents in terms of delaying any risk of

potential judgment be entered against them, especially if at the same time the further discussions were also designed to achieve a commercial settlement between the parties.

[97] Instead the High Court rejected the appellant's position that there was no need for the appellant to induce the respondents to enter into the consent judgment, in reliance of the testimony of DW1 who stated that it was critical for the appellant to quickly secure a judgment against the respondents and that the appellant wanted a 'quick closure' in respect of its claim against the respondents which also explained the appellant's unsuccessful attempt to obtain summary judgment in the Suit 290. The dismissal of the summary judgment application had thus, according to the High Court, disrupted the appellant's plan to have a 'quick closure' on the matter. Thus, at this appeal the respondents argued that if the appellant was confident of securing a judgment after full trial, there was no reason for DW1 to have signed the salient terms at all. Hence, the only reasonable inference is that the appellant had wanted to induce the respondents to enter into the consent judgment.

[98] At the risk of repetition, we stress that it was the respondents who approached the appellant. Dato Sonny Cheah brought up the idea of a commercial settlement to the appellant. That was in specifics, not mere general talk. The key features of the settlement as identified by the respondents (not the appellant) were the proposals on the land reclamation and sale of shares — the proposed transaction — which piqued the appellant's interest, and a principal consideration for the appellant agreeing to the consent judgment.

[99] It cannot be emphasised enough that if the respondents had managed to resolve the land reclamation extensions and the legal actions involving RCBSB and Eco Intelek (which were clearly for the respondents and not the appellant to do) within the stipulated two years, the appellant would have been able to purchase the shares in Eco Intelek and get repayment from the respondents with the setting off of the debts due (as plainly envisaged in the salient terms and the consent judgment). But the fact is, the respondents did not manage to do this.

[100] It bears emphasis that the appellant had long waited for the payment of the RM29m, since 2007. It is true that it failed to obtain summary judgment in Suit 290 but the trial would proceed only on the triable issue of whether there was forbearance on the part of the appellant against the respondents. All along there is no denying that the appellant had always emphasised that it was ready to proceed to trial. But it was undisputed, we reiterate, that it was Dato Sonny Cheah, for the respondents, who reached out to the appellant for a settlement discussion.

[101] As such, we agree with the appellant's argument that the appellant should not be faulted if the respondents offered a way for parties to settle the matter amicably and not to expend further costs and time on a trial. Indeed, if the respondents were confident of their defence, they would not have required to propose any discussion for settlement. But as there were issues to be further discussed on the commercial settlement, it was surely nothing but a win-win situation which would have benefitted all parties.

[102] How was all this an inducement by the appellant for the respondents to enter into the consent judgment? Given that the consent judgment, if settlement had been achieved, would have benefitted all parties, especially so the respondents, the finding of the High Court that the appellant had induced them to enter into the same cannot therefore be sustained.

[103] Moreover, whilst there was clear evidence that parties were in fact engaged in commercial negotiations, there was absolutely nothing to show that the respondents had ever at the material time complained that the appellant had exerted any undue influence or pressure. Nor can it be denied that whilst parties were engaged in discussions and meetings directly without the presence of solicitors, there was plainly no prohibition against them seeking advice from their lawyers. In fact, during the relevant period, including until the point of the recording of the consent judgment on 17 October 2013 and beyond, the respondents were represented by Messrs Cheang & Ariff who continued to act for the respondents even during the two years after the signing of the consent judgment. They only ceased their representation just prior to the institution of the instant suit against the appellant.

[104] There was nothing stopping the respondents from seeking and getting legal advice on any concerns vis a vis the consent judgment. The following passage from the decision of this court in *Abdul Razak bin Sheikh Mahmood & Ors v Amanah Raya Bhd & Ors and another appeal* [2018] 5 MLJ 125 is most apt:

> [31] The terms of the consent judgment do not contain words which state that the repayment of the loan amount by the appellants are to be sourced from the proceeds of the joint venture. We must not lose sight that respective parties were represented by legal advisers and if that had been the intention of the parties, such wordings would have been easily inserted in the consent judgment ...

[105] Moreover, despite the finding of the High Court that the appellant never intended to perform the salient terms and in connection thereto, there was misrepresentation, we are of the view that the evidence strongly points to the contrary. For one, notwithstanding the specific term in the consent judgment for the respondents to 'specifically effect and do all that is necessary' to redeem the RPS, they had absolutely no progress to show throughout the

two years. Thus, not only was the land reclamation issue not resolved — no update was even given. Neither were the legal suits resolved to even enable Eco Intelek to draft a sale and purchase agreement. Again, no update was given on this matter either.

[106] The respondents also submitted, as found by the High Court, that the fact that the consent judgment was signed six days after the salient terms were agreed on showed that the appellant knew that the representations in the salient terms would be relied upon by the respondents to enter into the consent judgment. This line of argument is not sustainable because evidence shows that the respondents entered into the settlement negotiations in the knowledge that if any settlement was to be achieved, it would be evidenced by a consent judgment to be recorded, and that it would be recorded by 21 October 2013. This is given the fact that even before discussions started in 2013 (as requested by the respondents in the first place), the appellant had already made clear in its letter of 9 September 2013 to the respondents of its desire that both parties could arrive at an amicable settlement by 21 October 2013 (which was the start of trial date of Suit 290) and proceed to record a consent judgment. Lest if be overlooked, the settlement discussions, at their core, concerned the debt owed by the respondents to the appellant under Suit 290, such that unless the consent judgment was recorded, there was absolutely no basis to progress with detailed negotiations on setting off the said debt.

[107] The respondents too never contacted the appellant to conduct the intended due diligence exercise which ought to have proceeded diligently had the issues of concern been resolved. There was no progress, there was no resolution of outstanding matters, and there were even no updates of progress. Dato Sonny Cheah's testimony of his readiness to perform the salient terms truly rings hollow as the respondents themselves had failed to see to the resolution of the issues of concern. The issues for the respondents to deal with as raised in the minutes of the meeting of 8 November 2013 were never addressed by them. The respondents did not even deliver the minutes of the said meeting to the appellant until after the main action commenced.

[108] Evidence of DW1 shows whilst the appellant was waiting, no documents were shown to the appellant to state that the State Government had agreed to the extension of the reclamation rights. Shareholders dispute (in RCBSB) persisted. The overall reclamation plan and development was never confirmed. All these in turn prevented the State Government from granting approval on land use, investors from actually agreeing to put money investing/whether land was for residential use or for commercial use or any other use. After all investors would obviously consider the viabilities before agreeing to put any money. On top of all these, the respondents kept the appellant in the dark and could not offer any evidence of communication by

A the respondents to the appellant during the moratorium to say that the settlement was being pursued and more importantly that they were waiting performance by the appellant.

B **[109]** Consider this, from the notes of proceedings dated 29 March 2022:

> LIEW — No, let me explain this. After the two-year moratorium, within that two years Dato' Sonny Cheah has never come back to us about any positive development about the reclamation rights. And all the other issues regarding the concession's company. And as a result of that we are not in the position to do any other thing but waiting for them. By the time after the end of the two-year moratorium we asked the same questions again. And the same answers given to us that asking us to wait. So, we said we can't continue to wait, two years moratorium already been provided. That's why we said that we would need to proceed with our, this legal proceeding to ensure that first, our entitlement is protected first. Then at the same, at the same time we are still listening to them whether there are any concrete proposals, you know were asked to consider. And if Dato' Sonny Cheah side can make any positive progress as far as this opportunity is concerned, I'll believe that they will have to inform us in the first place. But none, we have received none, no proper update from Dato' Sonny Cheah for that two years' period.

E **[110]** We further observe that the High Court did not fully appreciate that the new sets of draft terms sent by the respondents to the appellant on 25 October 2013 and then discussed on 8 November 2013 in fact included items not previously raised. The respondents instead asked that the appellant agree to the F same, which the appellant did not accede to as it justifiably viewed them as onerous conditions, such as expecting compliance by the appellant 'regardless' of uncertain future events.

[111] We also find that neither did the High Court, based on the grounds of G judgment of the court, take into consideration the conduct of the respondents before instituting the action to set aside the consent judgment, which in our view show that their decision to challenge the consent judgment was an afterthought. First, the respondents' lawyers did not respond, let alone object, to the appellant's lawyers' request — made three times prior to the expiry of the H two-year moratorium under the consent judgment — for the respondents to re-examine the settlement.

[112] This further demonstrates the respondents' inaction. We must emphasise, at the risk of repetition, that this was after the fact that the I respondents did not resolve the land reclamation, did not ask for the appellant to conduct the requisite due diligence exercise, and did not bother to provide any update, let alone report on the status of the legal suits or how they were concluded vis a vis Eco Intelek, in order to proceed to even draft a sale and purchase agreement.

[113] Secondly, despite all the inaction and silence, when the respondents did finally respond, in a letter of 4 January 2016, from the then lawyers for the respondents, on behalf of the first respondent, the request was made for another extension of two years, and highlighted that negotiations with the Government of Malaysia were in fact still pending. It is incidentally also of some interest to note that despite evidence showing that the respondents had asked for the further extension, PW2 testified that it was the appellant who asked for the same. This is directly contradicting the clear terms of the letter dated 4 January 2016, as referred to earlier, of the respondents' own lawyers then.

[114] Thirdly, despite the allegations of misrepresentation or fraud against the appellant in this suit, the respondents' lawyers and the first respondent had never actually raised any complaints to such effect before the suit. When conveying the request for the further two-year extension for example, the respondents did not complain that the settlement could not be achieved because of the appellant or its representatives. Not to mention the total absence of any accusation of misrepresentation against the appellant. In fact, it was only after the appellant filed the winding up petition against the first respondent given its failure to pay the debt owing, which then saw the appointment of the first respondent's new solicitors who for the first time mentioned that the respondents wished to set aside the consent judgment.

[115] It is telling that only when the first respondent was being threatened with a winding up, did the respondents spring into action to initiate the suit to challenge the consent judgment. Curiously, there was no complaint about the consent judgment before that. Also, the respondents did not even act immediately on the expiry of the two-year moratorium in the consent judgment if they genuinely had issues with the consent judgment, and blamed the appellant for the same. Instead the respondent waited for more than two years post the consent judgment, and then even sought yet another extension of two more years. We are of the view that the respondents ought to be estopped from taking this contrary position now (see the leading Federal Court decision in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 and the High Court decision in *Shinning Crest Sdn Bhd (appointed receiver and manager) & Ors v Malaysia Building Society Bhd* [2018] 10 MLJ 491).

[116] We cannot fathom how the appellant would have benefitted by allegedly misrepresenting the facts when it was for the respondents in the further detailed discussions to propose a satisfactory resolution on matters concerning the sums to be paid and the manner of payment, and on the proposed transaction vis a vis the status of pending legal actions involving the subject entity — RCBSB. The respondents never denied their obligations

A under the subscription agreements and the option agreements. The appellant was in fact ready for the trial to begin against the respondents in Suit 290. The respondents however asked for discussions to settle the matter, acceded to by the appellant.

B **[117]** It is clear as daylight that the consent judgment was to give the respondents time to achieve a global settlement via a share sale mechanism subject to the resolution of the related legal actions in the subject company (RCBSB). The respondents agreed for detailed negotiations after the consent judgment within a timeline of two years. Yet they never even furnished a copy C of a draft of a share sale agreement nor even a commitment by Eco lntelek as vendor. Remarkably, it was the appellant who was alleged never to have any intention of performing the resolution pursuant to the salient terms and the consent judgment.

D **[118]** We accordingly find that evidence did not support the finding of the High Court that the appellant had induced the respondents to enter into the consent judgment.

E **[119]** For completeness we should reiterate also that the High Court ordered general damages to be assessed and to be paid by the appellant to the respondents, and interest at the rate of 5%pa on such damages awarded. In light of our conclusion that the appellant was not liable for misrepresentation, F the issue of damages does not arise. The order of the High Court that the respondents assess their alleged loss and damages would consequentially be set aside.

[120] Nevertheless, we must state that we do not find evidence of the loss G allegedly suffered by the respondents. In fact, we note that neither did the respondents actually assert any loss and damage in the first place. They could not have done so, since the fact is, the second respondent was wound up by Bank Pembangunan, a third party, not the appellant, and that again, the undisputed truth is both the respondents were manifestly incapable of making H any payment to settle the debts owing to the appellant, with or without the consent judgment. On its part, the appellant never took any action against the respondents despite the consent judgment, and only did so in 2016 with the filing of the winding up petition against the first respondent.

I **[121]** We stress what we have stated before that the key point must be to appreciate that at all times the respondents — especially the first respondent — never denied their obligations to pay the appellant the RM29m, with interest. But that they have been unable to do so. This is consistent with the fact that the winding up petition by the appellant against the first respondent was also

supported by other creditors of the first respondent, namely, Perbadanan Bekalan Air Pulau Pinang Sdn Bhd and Ballast Nedam Groep NV (M) Sdn Bhd.

[122] And we must highlight again that due to the consent judgment, the respondents had gained an extra two years of moratorium, and that was after having already enjoyed eight long years from the time the debt under the subscription agreements first accrued.

[123] How this could translate into the respondents suffering loss and damage is near inexplicable. Instead there is in our view much substance in the appellant's assertion that it was the appellant who has suffered, given its inability to recover from the respondents the RM29m and accrued interest from way back in 2007 until 2023 — a period of 16 years.

CONCLUSION

[124] In view of the foregoing analysis and reasons, we are unanimous in holding that the finding by the High Court that liability for misrepresentation had been established against the appellant which justified the setting aside of the consent judgment, to be erroneous, principally on account of the clear lack of judicial appreciation of the evidence, rendering the judgment for the respondents to be plainly wrong.

[125] Appellate intervention is as such warranted, such that the decision of the High Court is therefore set aside, and the appeal is accordingly allowed, with costs to the appellant, here and below, subject to allocator.

Appeal allowed.

Reported by Ahmad Ismail